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SUPREME COURT, U. S.

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In The Supreme Court of the United States

OCTOBER TERM, 1970

No. 833

UNITED STATES FIDELITY AND GUARANTY COMPANY, Petitioner,

v.

MARIE L. HILL, Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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The petitioner United States Fidelity and Guaranty Company respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fifth Circuit, entered in this proceeding on June 2, 1970.

Opinion Below

The opinion of the Court of Appeals not yet reported appears in the Appendix hereto. The opinions of the District

Court for the Middle District of Florida likewise appear in the Appendix.

Jurisdiction

The judgment of the Court of Appeals for the Fifth Circuit was entered on June 2, 1970. A timely petition for rehearing en banc was denied on July 20, 1970, and this petition for writ of certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C.A. § 1254(1).

Questions Presented

MAY A GUEST IN A HOTEL WHO IS INJURED BY A DEFECT IN THE PREMISES HOLD RESPONSIBLE AN INSURANCE COMPANY WHICH UNDERTOOK TO MAKE SAFETY INSPECTIONS IN CONNECTION WITH INSURANCE POLICIES ISSUED TO THE HOTEL WHERE THERE IS NO PRIVITY BETWEEN THE GUESTS AND TH INSURANCE COMPANY, NOR HAS TH GUEST RELIED ON THE INSURANCE COMPANY'S UNDERTAKING?

Statutory Provision Involved

While Florida Statute 440.11(2) had not been enacted at the time of the fire and thus is not a direct bar to the action, it is indicative of the public policy of Florida and should be persuasive:

> F.S. 440.11(2). Any employer's workmen's compensation carrier, service agent, or safety consultant shall not be liable as a third party tort-feasor for assisting said

employer in carrying out said employer's rights and responsibilities under this chapter by furnishing any safety inspection, safety consultive service or other safety service incidental to the workmen's compensation or employers' liability coverage or to the workmen's compensation or employers' liability servicing contract; provided the exclusion from liability under this subsection shall not apply in any case where injury or death is proximately caused by the willful and unprovoked physical aggression or by the negligent operation of a motor vehicle by employees, officers or directors of the workmen's compensation carrier, service agent, or safety consultant of said employer.

Statement of the Case

This action for death and personal injuries, along with approximately 50 others of like nature, arose out of a fire in the Roosevelt Hotel in 1963. The District Court stayed proceedings in the other cases pending the outcome of the appeal in the instant case and when determined, the law in this case will be the law of all.

Action was instituted in the State court against the individuals who owned the hotel, against the operating lessee, Hotel Roosevelt Co., Inc., and against the hotel company's insurer who is this petitioner, United States Fidelity and Guaranty Company (hereinafter referred to as U.S.F. & G.). A settlement with all except U.S.F. & G. was made and this and the companion cases removed to the United States District Court upon the grounds of diversity of citizenship.

A uniform amended complaint was dismissed by the District Court, as was a second uniform amended complaint.

The second uniform amended complaint alleged that U.S.F. & G. insured the hotel company under public liability, workmen's compensation and fire policies; a part of a premium paid was for safety engineering services; that U.S.F. & G. made inspections of the entire premises to detect hazardous conditions and made reports of its inspections to the hotel company with recommendations for the elimination of various hazardous conditions; that U.S.F. & G. caused the hotel company to rely on U.S.F. & G., and thus prevented the hotel company from obtaining the benefit of other safety engineering services that were available to it; that U.S.F. & G. negligently inspected or negligently reported the results of its inspections to the hotel company and that certain described hazardous conditions were permitted to exist; the fire occurred and because of the described hazardous conditions, the deaths and injuries resulted.

The District Court's dismissal of the uniform amended complaint and the second uniform amended complaint is explained in its orders set forth in the Appendix.

On appeal, the United States Court of Appeals for the Fifth Circuit held that both the uniform amended complaint and the second uniform amended complaint stated causes of action under Florida law and reversed and remanded.

Reasons for Granting the Writ

1. THE DECISION IS CONTRARY TO THE DECISIONAL LAW OF FLORIDA.

As to the decisional law, it is submitted that this opinion is out of step. There is no Florida case directly on point but several reported cases would indicate that Florida's concepts of privity and reliance in tort cases have been violated.

Plaintiff neither alleges nor suggests that any dealings were had between herself and U.S.F. & G., nor does she allege that she relied on any actions taken by U.S.F. & G., nor in fact, that she had any awareness of U.S.F. & G. or its relationship with the hotel.

In the somewhat analogous situation presented in *American Box and Lumber Co. v. Chandler*, 102 Fla. 907, 138 So. 29 (1931), a carpenter, Chandler, while working on a scaffold allegedly containing a defective board, fell because of the defect and was injured. The court, in declaring the complaint insufficient in its attempt to sue the employer, said:

> "An action for damages for personal injuries rests upon the proposition that the defendant owed the plaintiff some legal duty express or implied which the defendant has breached, duty arising in favor of the plaintiff from some relation or privity between them."

Of more recent vintage is the court's decision in *Reed v. Black Caesar's, etc. Restaurant*, Fla. App. 3, 1964, 165 So.2d 787. There plaintiff sued the restaurant because, knowing that he was intoxicated and had become so at the restaurant, defendant's servant gave plaintiff's husband his ignition keys to his automobile which he then operated in such a manner as to cause his death (by driving the car into the bay). The court held there was no liability and affirmed the circuit judge for reaching the same conclusion; and this, although the complaint alleged that at the time and for a long time before that, defendant

> ". . . as an inducement to its patrons to consume alcoholic beverages at Black Caesar's Forge and as one of its regular customer services, assumed the responsibility and undertook to transport intoxicated patrons to their homes. . .

> "At the said time and place the defendants then and there undertook to care for the deceased, John C. Reed, and to transport him to his home. The defendants thereby had the duty of using reasonable care in their care and transportation of the deceased, John C. Reed."

The Third District Court of Appeal dealt with those allegations in these words:

> "This statement is not sufficient to support a cause of action because it fails to allege more than a legal conclusion. *Rudisil v. Taxicabs of Tampa, Inc.*, Fla. App., 1962, 147 So.2d 180.
>
> "It is not stated that the deceased in any way relied upon the 'regular customer service' or that he arranged or anticipated to be carried to his home at the time that he undertook his own intoxication. See 12 *Am. Jur.*, Contracts, Sec. 112, p. 789."

2. THE DECISION DIRECTLY CONFLICTS WITH THE PUBLIC POLICY OF THE STATE OF FLORIDA AS REFLECTED BY ITS LEGISLATIVE ENACTMENTS.

Aside from the decisional law for the moment, it is suggested that the most compelling reason calling for the reversal of the Appellate Court is that it flies almost directly into the face of a recent enactment of the Florida Legislature. Florida Statute 440.11(2), by its very terms forcefully reflects Florida's view as to the necessity for, and desirability of, safety engineering services provided by insurance companies generally. While this statute was enacted subsequest to this hotel fire and thus would not of itself constitute a bar to the action, nevertheless, it should be considered. It is suggested that this court's recent comment in *Moragne v. States*

Marine Lines, Inc. — U. S. —, 26 L.ed. 2d, 339, 90 S. Ct. — 1970, is appropriate:

> "This legislative establishment of policy carriers significance beyond the particular scope of each of the statutes involved. The policy thus established has become itself a part of our law, to be given its appropriate weight not only in matters of statutory construction, but also in those of decisional law.
>
> ". . . The Legislation does not, of course, merely enact general policies. By the terms of a statute, it also indicates its conception of the sphere within which the policy is to have effect. In many cases the scope of a statute may reflect nothing more than the dimensions of the particular problem that came to the attention of the legislature, inviting the conclusion that the legislative policy is equally applicable to other situations in which the mischief is identical."

Certainly the insurance carrier presents an inviting target when the plaintiff is interested in circumventing the limited recoveries permitted and the immunities granted by the compensation act. However, the area of potential liability of insurance carriers is broad and by no means confined to workmen's compensation situations. While the primary obligation for matters of safety ordinarily rests with the insured, it is a fact that fire insurance or general liability insurance underwriters frequently make inspections of the premises of the insured. Thus, whenever the plaintiff considers the policy limits inadequate, or where government or charitable immunities are a bar, or where policy coverage defenses appear formidable, or where proving the insured's negligence would be difficult, as well as where the workmen's compensation benefits do not satisfy the plaintiff, he may sue the insurer for negligent failure to inspect or negligent inspection.

Florida has recognized that insurance companies which engage in accident prevention work, the social desirability of which cannot be questioned, should be able to do so without incurring unlimited liability for failing to discover a hazard that some jury might think they ought to have discovered. If an insurance company can escape tort liability altogether by not making any inspections on the premises of the insured but may incur unlimited liability by making some inspections, it more than likely will decline to make any.

Turning to the Appellate Court's reasoning for a moment, it appears that it was overly influenced by one decision, and that a foreign one.

Nelson v. Union Wire Rope Corp., 199 N.E.2d 769 (Ill., 1964), involved actions brought in Illinois for deaths and injuries occuring in the fall of an elevator-type hoist in the construction of a courthouse in Duval County, Florida. American Mutual, the insurer carrying public liability and workmen's compensation, was made a defendant on the basis of its undertaking to supply safety engineering services. Judgments were entered against American Mutual. The Appellate Court of Illinois reversed, but itself was reversed by the Supreme Court of Illinois. While the ruling in Nelson was that of a court other than Florida, and thus should be accorded little, if any, weight, more importantly, the public policy of Florida and not been expressed by its legislature at the time of the Nelson decision as now.

Conclusion

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Fifth Circuit.

Respectfully submitted,

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APPENDIX

ORDER GRANTING MOTION TO DISMISS THE UNIFORM AMENDED COMPLAINT

Filed September 12, 1967

This is one of forty-four civil cases pending in this Court arising out of the Hotel Roosevelt fire in Jacksonville, Florida, on December 29, 1963, resulting in a number of deaths and personal injuries. All of the suits have been brought against the United States Fidelity & Guaranty Company, as sole defendant, and have either been removed from the Circuit Court of Duval County, Florida, to this Court by reason of diversity, or brought directly here for the same reason.

The attorneys for all of the plaintiffs have filed a uniform complaint or a uniform amended complaint in each of the cases, which complaints are identical except for the names of the parties plaintiff and the allegations as to the damages claimed. A motion to dismiss the complaints for failure to state a claim upon which relief can be granted has been filed in each of the cases and thoroughly briefed and orally argued. The same questions as to legal liability of the defendant to the various plaintiffs are presented in all of the cases. These suits are not brought for breach of the insurance policies issued by defendant to the hotel company which are referred to in the complaints. Here the complaints specifically allege that the defendant insurance company "made periodic safety engineering inspections of the hotel premises to detect conditions hazardous to persons occupying and using the hotel premises", and "negligently performed such inspections in failing to detect such conditions and in failing to report to the hotel company that such conditions rendered the hotel unsafe for housing guests".

The questions of Florida law presented as to the legal liability of the insurance company by its motions to dismiss have not been passed upon or decided in any reported decision of the Supreme Court of Florida or the District Courts of Appeal of Florida as far as is known to this Court.

This Court has carefully considered the arguments of counsel and the briefs, and especially the decisions of the Appellate Court of Illinois, 187 N.E.2d 425, and the Supreme Court of Illinois, 199 N.E.2d 769, in Nelson v. Union Wire Rope Corporation, et al., and the citation of authorities contatined therein. The Nelson case involved personal injuries and deaths arising out of the construction of the Duval County Court House in Jacksonville, Florida, in 1957, as the result of a fall of an elevator hoist carrying employees of the contractors.

This Court is of the opinion that the Supreme Court of Florida would probably follow the well reasoned opinion of the Appellate Court of Illinois in the Nelson case if the present cases were presented to them for decision, rather than the opinion of the Supreme Court of Illinois in the Nelson case, where three Judges dissented.

The Appellate Court of Illinois, in holding that there was no liability of the insurance company in the Nelson case, said:

"We come, therefore, to the question as to whether nonfeasance in connection with a gratuitous undertaking can give rise to liability unless it be shown that the intended beneficiaries of the undertaking had relied upon its performance. We believe it cannot, because under those circumstances reliance lies at the very heart of the cause of action".

Neither the uniform complaint nor the uniform amended complaint in each of these cases contain any allegation what-

soever that the plaintiffs relied for their safety on the gratuitous inspections alleged to have been made negligently by defendant's omission or failure to properly inspect the hotel premises for hazards to guests. The plaintiffs have, therefore, failed to show the breach of any legal duty owed by defendant to them.

Accordingly, this Court holds that the complaints in each of these cases wholly and completely fail to state a cause of action upon which relief can be granted, and the motions to dismiss the complaints in each of these cases are granted, with leave to the plaintiffs to amend the complaints as advised within 30 days from the date of this order.

Done and Ordered at aJcksonville, Florida, this 12th day of September, 1967.

CHARLES R. SCOTT,
Judge

ORDER GRANTING MOTION TO DISMISS SECOND UNIFORM AMENDED COMPLAINT

Filed January 9, 1968

This cause came on for hearing on the motion of the defendant to dismiss the second uniform amended complaint for failure to state a claim upon which relief can be granted. In addition to this case, there are pending in this Court the following numbered companion cases: 67-347-Civ-J through 67-383-Civ-J, 67-428-Civ-J, 67-446-Civ-J, 67-447-Civ-J, 67-447-Civ-J, 67-461-Civ-J, 67-462-Civ-J, 67-495-Civ-J, 67-714-Civ-J, 67-783-Civ-J, 67-813-Civ-J, 67-816-Civ-J and 67-818-Civ-J. All of these cases are actions for damages for either personal

injuries or wrongful death, and the second uniform amended complaint in each companion case contains the same allegations of negligence against the defendant, United States Fidelity and Guaranty Company, as those set forth in the second uniform amended complaint filed in this case. The Court is of the opinion that the second uniform amended complaint is insufficient for the reasons and upon the grounds heretofore set forth in this Court's opinion and order of September 12, 1967, dismissing the original uniform amended complaint in this case. The Court having announced its intention to grant the defendant's motion to dismiss, and the plaintiff herein having elected not to further amend the second uniform amended complaint, it is thereupon Ordered and Adjudged:

1. That the plaintiff's second uniform amended complaint is hereby dismissed with prejudice, that the plaintiff, Marie L. Hill, take nothing by her suit, and that the defendant, United States Fidelity and Guaranty Company, recover of the plaintiff its cost of action.

2. That a copy of this order shall be filed by the Clerk in each of the above-numbered companion cases and each companion case is hereby stayed until further order of the Court.

Done and Ordered at Jacksonville, Florida, this 9th day of January, 1968.

CHARLES R. SCOTT,
Judge

FIFTH CIRCUIT OPINION

Appeal from the United States District Court for the Middle District of Florida

June 2, 1970

Before WISDOM, GODBOLD and SIMPSON, Circuit Judges.

GODBOLD, Circuit Judge: This is one of approximately 50 cases growing out of a fire at the Roosevelt Hotel in Jacksonville, Florida in 1963 and filed in the District Court for the Middle District of Florida. The District Court has stayed proceedings in the companion cases pending the outcome of this appeal.

Appellant and her husband were guests in the hotel. Her claim against USF&G is for damages for personal injury to herself and for the wrongful death of her husband, both suffered in the fire. USF&G was the hotel's public liability, fire and workmen's compensation insurer. The basis of appellant's claim is alleged negligent performance by USF&G of an undertaking by it to carry out what are termed safety engineering inspections of the hotel. The principal issue is whether USF&G owed a legal duty to the hotel's guests.

The District Court granted USF&G's motion to dismiss appellant's claim as stated in the Uniform Amended Complaint for failure to state a claim upon which relief could be granted, and granted leave to amend.[1] Appellant filed a Second Uniform Amended Complaint, and it was dismissed for the same reasons assigned for the first dismissal.[2] The

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[1] 272 F.Supp. 589 (M.D. Fla. 1967).

[2] This order is not officially reported.

appellant elected not to plead further, and the court entered a judgment of dismissal with prejudice.

We conclude that the District Court erred in dismissing the Uniform Amended Complaint, and the Second Uniform Amended Complaint, and we reverse.[3]

1. History of the proceedings.

This action and others were filed originally in Florida state court, charging negligence against individual owners of the hotel, the hotel company (the operating lessee) and USF&G. The state court denied USF&G's motion to dismiss the Uniform Amended Complaint, holding that it stated a cause of action for negligent violation of duties as defined in the decision of the Supreme Court of Illinois in *Nelson v. Union Wire Rope Corp.*, 199 N.E. 2d 769 (Ill. 1964) and the Florida case of *Modlin v. Washington Avenue Food Center*, 178 So. 2d 596 (Fla. Ct. App. 1965).[4] *Nelson*, though decided by the courts of Illinois, applied Florida law. Prior to trial, claims against the individual owners and the operating lessee were settled, and those parties were dismissed from the case. USF&G then removed to federal court on diversity grounds.

After removal USF&G moved the federal District Court for rehearing of its motion to dismiss, which had been denied in state court. The District Court granted rehearing and granted the motion, stating that it was following the opinion

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[3]The parties have briefed and argued the sufficiency of both complaints. No party has questioned that both dismissal orders are before us for review, and we raise no question. See 6 Moore, Federal Practice § 54.12[1] at 116, and cases there cited.

[4]Subsequently *Modlin* was affirmed by the Supreme Court of Florida, *sub nom* Modlin v. City of Miami Beach, 201 So. 2d 70 (1967).

of the Appellate Court of Illinois in *Nelson v. Union Wire Rope Corp.*, 39 Ill., App. 2d 73, 187 N.E. 2d 425 (1963), which it thought the Supreme Court of Florida would follow, rather than the reversing opinion of the Supreme Court of Illinois, which the Florida trial court had followed.

2. The power of the District Court to rehear the motion to dismiss.

In the beginning we dispose of the contention of appellant that the federal court could not rehear the motion to dismiss the Uniform Amended Complaint and, if it did so, could not reach a result opposite to that of the state court. Appellant's argument is a sort of catch-all amalgam of what the federal court is *Erie*-bound to do, what as a matter of policy it should do, law of the case, and the evils of forum shopping.

A final decision of a state trial court is not binding on the federal courts as a final expression of the state law, *King v. United Order of Commercial Travelers of America*, 333 U.S. 153, 92 L.Ed. 608 (1948). In this instance the decision of the state court does not have the imprimatur of finality, but in lieu it has the persuasive force of having been entered in the very case and on precisely the same issues, and it has the additional persuasiveness of the fact that the state judge, in seeking to divine what was the law of Florida, relied upon the opinion of the highest court of Illinois, while the federal judge, engaged in the same search, chose to follow the reversed opinion of the intermediate appellate court of Illinois. The state judge had power to re-examine his own order on motion to dismiss until such time as final judgment was entered, and the federal judge would have had power to do the same with an order of his own. The power to re-examine is not lost by the transfer from state to federal system.

3. The Uniform Amended Complaint

The Uniform Amended Complaint contains these allegations as the basis for the claim that USF&G had a duty to hotel guests which it breached:

> 9. From the time the owners acquired ownership of the hotel until the time of the fire, the defendant United States Fidelity & Guaranty Company (hereinafter referred to as the "insurance company") issued and carried various public liability, fire, and workmen's compensation insurance policies covering said premises and the operation of said hotel and made periodic safety engineering inspections of the hotel premises to detect conditions hazardous to persons occupying and using the hotel premises. The insurance company made reports of such inspections to the hotel company together with recommendations for the elimination of any such hazardous conditions, and the owners and hotel company complied with such recommendations and relied upon the insurance company to inspect the hotel premises and to detect and report conditions hazardous to persons occupying and using the hotel premises. It became and was the duty of the insurance company to exercise reasonable care in making such inspections and although the insurance company, in the performance of its safety engineering inspections knew or should have known of the conditions alleged in paragraphs 4 and 5, above, and knew or should have known that such conditions constituted an unreasonable risk of injury from fire and smoke to persons in the hotel and rendered the premises unsafe for the housing of guests as alleged in paragraph 6, above, and should have reported the existence of such hazardous conditions to the hotel company, yet the

> insurance company carelessly and negligently performed such inspections in failing to detect such conditions and in failing to report to the hotel company that such conditions rendered the hotel unsafe for housing guests.

We conclude that this stated, under Florida law, a claim on which relief could be granted. A point of entry for discussion is § 324A of the Restatement of Torts, Second (1965):

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of a third person or his things, is subject to liability to the third person for physical harm resulting from his failure to exercise reasonable care to perform[5] his undertaking, if
>
> (a) his failure to exercise reasonable care increases the risk of such harm, or
>
> (b) he has undertaken to perform a duty owed by the other to the third person, or
>
> (c) the harm is suffered because of reliance of the other or the third person upon the undertaking.

Comment e. to that subsection provides:

> e. Reliance. The actor is also subject to liability to a third person where the harm is suffered because of the reliance of the other for whom he undertakes to render the services, or of the third person himself, upon his undertaking. This is true whether or not the negligence of the actor has created any new risk or

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[5]The reporter for this edition of the Restatement, by a letter to counsel furnished to this court, has verified that the word "protect" which appears at this point is a typographical error and should read "perform."

> increased an existing one. Where the reliance of the other, or of the third person, has induced him to forgo other remedies or precautions against such a risk, the harm results from the negligence as fully as if the actor had created the risk.

Section 324A subjects one to liability whether his undertatking be gratuitous or for compensation. The District Court characterized the Uniform Amended Complaint as alleging a purely gratuitous undertaking by USF&G and the parties take the same approach. We have some question whether the language of paragraph 9, quoted above, confines the role of USF&G to that of a mere volunteer. But, as a practical matter, we accept that characterization. The Second Uniform Amended Complaint positively alleges that USF&G's undertaking is for compensation.

The most full analysis of the Florida law is in the two *Nelson* opinions of the Illinois courts. In *Nelson* actions were brought in Illinois for seven deaths and injuries to eleven other persons occurring in the fall of an elevator-type hoist in the construction of the Duval County courthouse at Jacksonville, Florida. Suits were brought in Illinois against American Mutual, which was the insurer carrying public liability and workmen's compensation insurance for the general contractor, on the basis of its undertaking to supply safety engineering service (and against other defendants on other theories). Judgments were entered against American Mutual.

On appeal the Appellate Court of Illinois held that the policies issued by American Mutual gave it the right to inspect the premises and equipment of the general contractor (Auchter) but did not impose upon it any duty to do so, and that the theory of plaintiffs' case was negligent performaance by American Mutual of a gratuitous undertaking to perform safety engineering services. The Appellate Court

reversed on the basis of its conclusion that American Mutual had not undertaken inspection of the hoist and cable as part of its gratuitous safety engineering services, but, alternatively, even if it had entered into such an undertaking, no one, neither Auchter nor the plaintiffs, had relied upon the insurer to inspect the hoist or cable which failed. 187 N.E. 2d at 449, 453.[6]

The Supreme Court of Illinois reversed the Appellate Court, holding that it was not essential to prove reliance, but that in any event the proof had adequately shown reliance by Auchter:

> Plaintiffs have argued that if reliance by Auchter is essential to defendant's liability to them, the proof is such that the jury could find with reason that Auchter had in fact relied upon defendant's safety inspections. Without making an extended analysis of the pertinent evidence, we believe that there is merit in this contention. However, for the reasons already stated, it is enough to say that reliance, either by plaintiffs or Auchter, was not an absolute essential to the liability of the defendants in this case.

199 N.E. 2d at 780. The dissenters in the Supreme Court thought there had been no proof of reliance of any type, and that there had to be proof, but they recognized that liability would arise upon "proof of reliance, or of what may be the same thing, proof that the defendant caused the contractor to refrain from performing its duty to inspect." 199 N.E. 2d at 796. To the same effect, see 199 N.E. 2d at 797.

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[6]While its opinion is not entirely clear on the point, the Appellate Court appeared to indicate that reliance by the insured would have been sufficient, by its quotation, as an analogy, of § 354 of the Restatement of Agency (Second), which, in referring to liability of an agent who undertakes to act, refers to reliance by the principal or by a third party. 187 N.E. 2d at 449-450.

In the instant case the appellant alleged reliance by the owners and the hotel company. This complies with the standards of the Restatement, of the Appellate Court of Illinois, of the dissenters in the Supreme Court of Illinois, and is a heavier burden than required by the majority in the Supreme Court. The District Judge erred in requiring allegation of reliance by the plaintiff as a condition of statement of a claim upon which relief could be granted.

What the Illinois courts think is the Florida law is not binding on the Florida courts or conclusive for us in our *Erie* search for the Florida law. But we are of the view that the principles common to both *Nelson* opinions, as described above, correctly articulated the law of Florida governing the situation in which there has been reliance by either the recipient of the services undertaken by the insurer or a third person for whose protection the services should be recognized as necessary. Because in the instant case reliance by the hotel company is alleged we are not called upon to reach the issue of whether the Illinois Supreme Court was correct in its view that under Florida law there may be liability without reliance.[7]

Nelson has been cited with approval in a dictum in *Modlin v. Washington Avenue Food Center*, 178 So.2d 596 (Fla. Ct. App. 1965), *aff'd sub nom. Modlin v. City of Miami Beach*, 201 So.2d 70 (1967):

> There is no doubt but that a private corporation is liable when it undertakes a duty of inspection, negligently performs that inspection, and the negligent performance causes injury to another. Banfield v. Ad-

[7]Reed v. Black Caesar's Forge Gourmet Restaurant, 165 So. 787 (Fla. Ct. App. 1964), affirmed the dismissal of a gratuitous undertaking case for want of allegations of reliance. See also America Box & Lumber Co. v. Chandler, 138 So. 29 (931).

> dington, 104 Fla. 661, 140 So. 883 (1932); Nelson v. Union Wire Rope Corp., 31 Ill. 2d 69, 199 N.E. 2d 769 (1964) [applying Florida law].

178 So.2d 601.[8]

Nelson was followed in *Gallichio v. Corporate Group Service, Inc.*, 227 So.2d 519 (Fla. Ct. App. 1969), in which an injured longshoreman sued an agency which apparently had contracted with his employer to take over safety inspections, alleging negligent performance of the contractual duty. The court held the complaint stated a cause of action under Florida's third party beneficiary rules. The court rejected the contention that privity was required unless the defendant had knowledge that the plaintiff would rely, saying:

> In the present case the allegations of the complaint lead to the inescapable inference that all drydock workers (including the appellant) of the employer with whom the appellee contracted might be harmed if the appellee negligently performed its contractual duty to make safety inspections. Privity is not required in such circumstances. See Nelson v. Union Wire Rope Corporation, 31 Ill. 2d 69, 199 N.E. 2d 769, 779-780 (1964); cf. Morse v. Hendry Corp., Fla. App. 1967, 200 So.2d 816. This conclusion is reinforced by the reasoning of Justice Terrell in Matthews v. Lawnlite Company, Fla. 1956, 88 So.2d 299. Cf. Manheim v. Ford Motor Company, Fla. 1967, 201 So.2d 440. We hold that one who may foreseeably be injured by the negligent performance of a contractual duty has the right to maintain an action against the allegedly neg-

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[8]In *Modlin* the inspector was a government officer and liability was asserted against the city. The decisions in both Florida courts rest on municipal immunity to a claim of this nature.

ligent performer even though he is not in privity with that performer.

United States v. Gavagan, 280 F.2d 319 (5th Cir.) *cert. denied*, 364 U.S. 933, 5 L.Ed. 2d 365 (1961), is a maritime tort case in which the court held the United States liable for consequences of negligent failure to rescue the crew of a disabled fishing vessel after the Coast Guard undertook the rescue effort, and the friends and families ashore, in reliance on the government's effort, had withheld search and rescue efforts of their own. The reliance was not that of the fishermen on the boat but of others who, like the hotel company, might have taken action to safeguard those who were in danger (or might be placed in danger) but for the undertaking by the defendant to act.

The responsibility of a contracting party to a third person with whom he has made no contract has presented the courts with perplexing difficulty for a long time. The dicta of *Winterbottom v. Wright*, 10 M. & W. 109, 152 Eng. Rep. 402 (1842), have died hard. The appellee takes a stand on the crumbling citadel of privity. That concept, as a limitation on the tort liability of the contracting party to the third person with whom he has no contract, "has now generally been thrown into judicial discard." Seavey, *Reliance on Gratuitous Promises*, 64 Harv. L. Rev. 913, 917 (1951). Florida, like all, or almost all,[9] American jurisdictions has discarded privity in claims against the manufacturer of chattels by the third party who has purchased from a retailer. *Matthews v. Lawnlite Company*, 88 So.2d 299 (1956), warmly embraces the "more humane or reasonable trend of decisions" exemplifying

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[9]See Prosser, § 96 at 661 (1964 ed.).

"a doctrine more in line with reason and justice." 88 So.2d at 300.[10]

"In dealing with the liability to third persons of other contracting parties, such as those who undertake to furnish labor or services, the law has not kept pace with the developments as to suppliers of chattels. . . . The fetish of 'privity of contract' has remained more of an obstacle; and while 'the assault upon the citadel of privity is proceeding these days apace,' the fear of burdening the defendants with a crushing responsibility, which has largely disappeared from the field of sales, still tends to lead many courts to deny liability in cases which fall behind the general progress." *Prosser, supra,* § 99 at 688-89. Florida has not lagged behind. It is one of a handful of jurisdictions that have laid aside privity as a bar to recovery in the typical waterworks case, in which a waterworks company has undertaken to supply water to fire hydrants and as a consequence of its failure plaintiff's house has been destroyed by fire. *Woodbury v. Tampa Waterworks Co.,* 49 So. 556 (1909). In *Gallichio v. Corporate Service, Inc., supra,* the Florida Court of Appeals rejected privity where an identifiable group were exposed to risk of harm by defendant's negligent performance of a contractual duty to make safety inspections.

Investment Corporation of Florida v. Buchman, 208 So.2d 291 (Fla. Ct. App.), *cert. discharged,* 216 So.2d 748 (1968), does not command a result different from that which we reach.[11] It concerned a claim of liability of accountants to third parties for negligent misrepresentation in the form of

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[10]Also see Bernstein v. Lily-Tulip Cup Corp., 177 So.2d 362 (Fla. Ct. App.), *aff'd,* 181 So.2d 641 (1966); Carter v. Livesay Window Co., 73 So.2d 411 (Fla. 1954) (real property).

[11]Nor, for the same reasons, does Sickler v. Indian River Abstract & Guaranty Co., 195 So. 195 (1940), concerning non-liability of an abstractor to third persons relying on abstracts prepared by him.

financial statements on which it was known the claimants would rely.[12] The Florida court held there was no such duty as would give rise to a claim for negligence. Claims based on negligent misrepresentation and resulting in invasion of only a purely economic interest of the third party have had a wholly different judicial history and treatment from those based on actions of the defendant other than misrepresentations and resulting in physical harm to the plaintff's person. *Seavey, supra* at 913, 915; *Prosser, supra,* § 99 at 688-696.

> The problem of the persons to whom the defendant may be liable, already difficult in the case of intentional misrepresentation, becomes still more acute where it is merely negligent. The possible liability might result from the communication of a statement to remote plaintiffs is so great, and may be so far out of proportion to the fault involved, that there is general agreement that a more restricted rule is necessary in the case of economic loss than where there is tangible harm to person or property.

Prosser, *supra,* § 102 at 721.[13] But for one to suffer injury

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[12]See Comment, Accountants' Liabilities for False and Misleading Financial Statements, 67 Colum. L. Rev. 1437 (1967).

[13]See also 2 Harper and James, Torts, at 1048, n. 24 (1956 ed.): "Outside the field of accidental personal injury or property damage, the duty to use due care is often stopped short of persons who may foreseeably be injured by negligence. [citing Ultramares Corp. v. Touche Niven & Co., 255 N.Y. 170, 174 N.E. 441 (1931)].

And see, Restatement of Torts, § 552, *Comment a,* at 123, referring to liability for negligently supplying information for the guidance of others in their business transactions:

> "As in the case of fraudulent misrepresentations the liability is confined to those who are intended to rely upon the information and who rely upon it in a type of transaction in which it is the maker's purpose to influence their conduct. This distinction does not come from the fact that the matter supplied is formation rather than a tangible thing. It comes from the fact that it is supplied for guidance in a business transaction and not for guidance in a matter in which the safety of persons, lands or chattels is involved."

to person or property there must be, in most instances, psysical proximity, which operates as a limiting factor on the scope of liability.

The elusive nonfeasance - misfeasance dichotomy troubled the two Illinois courts. It has been described as an "obviously immaterial distinction." *Seavey, supra,* at 916-17. In many circumstances defendant's failure to perform the undertaking at all, described as nonfeasance has been employed as a means to permit recovery in cases of negligent performance of the undertaking. *Prosser, supra,* § 99 at 689, 692. The District Judge in the case before us appeared to rely on the Illinois Appellate Court's characterization of the insurer's failures as nonfeasance, a characterization held by the Supreme Court to be erroneous. As the basis for dispensing with necessity of reliance the majority in the Supreme Court relied upon their characterization of the same conduct as misfeasance. All of this turns out to be somewhat of a teapot tempest in our decision, because reliance has been alleged.

Even in what otherwise arguably might be nonfeasance cases liability often has been imposed where the contracting party has entered upon performance so that a duty has, in effect, been assumed by conduct, and the situation is even clearer where the contracting party relies upon performance and as a result a third person is injured. *Prosser, supra,* at 690-91. What is before us is such an "even clearer" case, because there has been alleged entry upon performance by the insurer, reliance by the hotel company, and resultant injury to third persons.

In any event, the slippery misfeasance-nonfeasance distinction is another citadel not sacrosanct in Florida. Waterworks cases are the classic cases for assertion of mere nonfeasance as a shield against liability, but, as pointed out above, Florida is one of the few states that impose liability. In *Woodbury,*

supra, the Florida Supreme Court commented: "The liability is for negligence of omission or commission in the performance of the duties imposed by law." 49 So. at 565. More recently the distinction has been brushed aside in the case of the landlord who fails to perform an undertaking to repair.

> Under earlier law, the rule was general that the landlord is not liable for an outright failure to repair, but there is now a pronounced trend toward the view that the landlord may be liable under such circumstances . . . . The modern view has been adopted in the Restatement of Torts, § 357, and we do not hesitate to follow it. It would seem inconsistent to us to hold in this context that the landlord is liable for misfeasance but that he may escape liability by nonfeasance.

Propper v. Kessner, 104 So.2d 1, 3 (1958).

We turn to considerations of social utility. The insurer which engages in safety engineering on a hotel building serves the interests of the class of hotel guests, as well as its own interests in underwriting, establishing rates, and minimizing losses, and the interests of the hotel in preventing or minimizing damage to its property and injury or loss to its guests. Insurers who make safety inspections may make substantial and socially desirable contributions to safety and in turn to preservation of life and property. But, on the other hand an insurer may by the manner of conduct of safety inspections, or its representations concerning safety inspections, create serious risk of harm to third persons if the insured relies on what the insurer says or does. If the hotel in reliance on what the insurer undertakes to do lessens or omits its own safety measures and the insurer does not perform with due care what it has undertaken to do, the guests are potential victims.

The argument that insurers should be able to carry out inspections programs without exposure to potentially heavy liability for failing to discover hazards is largely answered in this case, and other cases like it, by the element of reliance. Justice Shaeffer recognized this in his dissent in the Illinois Supreme Court decision in *Nelson*. If reliance is a prerequisite to liability the insurer may substantially protect itself in its safety undertakings, and at the same time protect users of the premises who may be the victims of lack of performance, by making unambiguously clear to the insured either that it can rely thereon or that it must not rely. Whether Florida chooses to impose liability absent reliance is for it to decide in some other case.

4. The Second Uniform Amended Complaint

This complaint alleges in detail the purposes of USF&G's safety engineering department and the training of its agents to take advantage of its safety engineering service as a means of soliciting insurance business. The plaintiff asserts that the hotel company bought its policies in reliance on prior representations concerning the service, and afterwards relied on the inspections actually made, and relied also by not availing itself of safety engineering service obtainable from others. Plaintiff alleges that part of the premium paid by the hotel company was for safety engineering services.

This complaint was dismissed as insufficient for the same reasons as the Uniform Amended Complaint. *A fortiori*, this was error.

5. Proximate Cause

The District Judge dismissed both complaints on the basis of absence of legal duty and did not reach proximate cause. Since appellee urges to us that in both complaints allegations

of proximate cause are insufficient, and presumably would make that argument again in the District Court, we hold that these contentions are without merit. *Moser v. Semenza*, 177 So.2d 880 (Fla. Ct. App. 1965).[14] *Romedy v. Johnson*, 193 So.2d 487 (Fla. Ct. App. 1967), is not authority that proximate cause cannot exist in the case before us. *Romedy* held insufficient a complaint charging wrongful death in the same hotel fire. The decedent was a fireman, who was called upon the premises to fight the fire, inhaled quantities of smoke, and as a result suffered a heart attack and died. Subsequently in *Hotel Roosevelt Co. v. Hill*, 196 So.2d 233 (Fla. Ct. App. 1967), a case arising from the same fire and in which both the instant appellant and appellee were parties, the court made plain that it did not intend by the generality of its language in *Romedy*, where decedent was a licensee, to decide the case of a hotel guest, a business invitee.

REVERSED and REMANDED.

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[14] *Cf.* Western Hills Bowling Center, Inc. v. Hartford Fire Ins. Co, *412 F.2d 563* (5th Cir. 1969).